SHAHEEN ABU BAKAR

v.

PERBADANAN KEMAJUAN NEGERI SELANGOR

FEDERAL COURT, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
MOHD AZMI FCJ
ZAKARIA YATIM FCJ
[CIVIL APPEAL NO: 02-3-96 (B)]
2 JUNE 1998

CIVIL PROCEDURE: *Summary judgment - Application for summary possession of land - Who has locus standi to bring such proceedings - What has to be shown to defeat such proceedings - Rules of the High Court 1980, O. 89*

CIVIL PROCEDURE: *Summary judgment - Triable issues - Whether case ought to be dealt with summarily*

CIVIL PROCEDURE: *Summary judgment - Application for summary possession of land - Contention that occupation was consented and or acquiesced to - Contention that applicant had no locus standi - Whether there are triable issues*

The appellant was one of many settlers occupying a part of land belonging to the respondent. A sale and purchase agreement was entered into between the respondent and one Punca Alam whereby the latter purchased a portion of the land belonging to the former. By this agreement, Punca Alam had a right to have the purchased land delivered to it in vacant possession. As a result, the settlers were sought to be evicted. To achieve this end, the respondent and Punca Alam prayed in aid the summary procedure prescribed by O. 89 of the Rules of the High Court 1980 ('RHC') to obtain possession. The respondent filed one application under the said order whilst Punca Alam filed two applications under the same order. The High Court ordered the eviction of the settlers and the Court of Appeal confirmed the orders. The appellant appealed to this court.

The appellant's appeal was based on two grounds. Firstly, the appellant contended that she had occupied the said land with the consent and or acquiescence of the owner of the land. It was argued that even if the initial entry of the settlers on the said land was unlawful, acquiescence made such entry lawful. In support of this, the appellant referred to various instances which suggested that not only was the authority aware of the existence of the settlers but that they had actually encouraged development on the settled area.

The second ground of appeal was that the respondent had no *locus standi* to make the application under O. 89 of the RHC because it was not clear from the evidence whether the respondent was in possession of the said land. Further to this, the appellant averred that her land was located within the portion of land sold to Punca Alam.

Held:
Per Zakaria Yatim FCJ

[1] A court hearing an application under O. 89 of the RHC considers only affidavit evidence. The persons against whom the proceeding is filed need only show that they have an arguable case that they occupied the land under licence. Further, where there are issues to be tried, the case should not be dealt with summarily under O. 89.

[2] A person who claims possession has *locus standi* to bring a proceeding under O. 89.

[2a] Punca Alam's conduct in filing the two applications under O. 89 of the RHC amounted to it waiving its right under the sale and purchase agreement to have the purchased land delivered to it in vacant possession. With the waiver, possession of the purchased land transferred to Punca Alam. Once the said land was transferred to Punca Alam, the respondent could no longer claim possession of the said land.

[2b] It can strongly be argued that the appellant's land was within the land sold to Punca Alam. Therefore, the question of whether the respondent had the *locus standi* to file the O. 89 application against the appellant is a triable issue.

[3] There is a strong arguable case that the settlers occupied the said land with the implicit consent of the state authority. Even if their entry on the said land was unlawful, there is an arguable case that they occupied the said land with the acquiescence of the state authority. This again is a triable issue.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu merupakan salah seorang daripada peneroka-peneroka yang menghuni sebahagian tanah kepunyaan responden. Satu perjanjian jual beli telah dimasuki antara responden dan Punca Alam di mana pihak yang terkemudian membeli sebahagian tanah kepunyaan pihak yang terdahulu. Melalui perjanjian ini, Punca Alam berhak untuk tanah yang dibeli dihantar-serahkan kepadanya dalam keadaan milikan kosong. Akibatnya, peneroka-peneroka tersebut telah diusahakan supaya diusir. Bagi mencapai maksud ini, responden dan Punca Alam telah memohon bantuan melalui prosedur terus yang ditetapkan oleh A. 89 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') untuk mendapatkan milikan. Responden memfailkan satu permohonan di bawah aturan tersebut sementara Punca Alam memfailkan dua permohonan di bawah aturan yang sama. Mahkamah Tinggi memerintahkan peneroka-peneroka tersebut diusir dan Mahkamah Rayuan mengesahkan perintah-perintah tersebut. Perayu merayu kepada mahkamah ini.

Rayuan perayu adalah berasaskan dua alasan. Pertamanya, perayu menegaskan bahawa beliau telah menghuni tanah tersebut dengan kebenaran dan/atau persetujuan tuanpunya tanah tersebut. Ianya telah dihujahkan bahawa walaupun kemasukan awal peneroka-peneroka ke atas tanah tersebut adalah salah di sisi undang-undang, persetujuan telah menjadikan kemasukan yang sedemikian sah di sisi undang-undang. Untuk menyokong hujahan ini, perayu merujuk kepada pelbagai situasi yang mencadangkan bahawa bukan sahaja autoriti tertentu sedar akan kewujudan peneroka-peneroka malah mereka juga telah menggalakkan perkembangan di atas tanah yang dihuni.

Alasan rayuan yang kedua adalah bahawa responden tidak mempunyai *locus standi* untuk membuat permohonan di bawah A. 89 KMT kerana ianya tidak jelas daripada keterangan samada responden mempunyai milikan tanah tersebut. Selanjutnya, perayu menegaskan bahawa tanah beliau terletak di dalam bahagian tanah yang telah dijual kepada Punca Alam.

Diputuskan:
Oleh Zakaria Yatim FCJ

[1] Sesebuah mahkamah yang mendengar sesuatu permohonan di bawah A. 89 KMT hanya mempertimbangkan keterangan afidavit sahaja. Orang-orang terhadap siapa prosiding tersebut difailkan hanya perlu menunjukkan bahawa mereka mempunyai kes yang boleh dihujahkan bahawa mereka telah menghuni tanah tersebut dengan kebenaran berlesen. Selanjutnya, di mana terdapatnya isu-isu yang harus dibicarakan, kes tersebut tidak seharusnya diuruskan secara terus di bawah A. 89.

[2] Seseorang yang menuntut milikan mempunyai *locus standi* untuk memulakan prosiding di bawah A. 89.

[2a] Perlakuan Punca Alam dalam memfailkan dua permohonan di bawah A. 89 KMT membawa kepada pengenepian haknya di bawah perjanjian jualbeli supaya tanah yang telah dibeli itu dihantar-serah kepadanya dalam milikan kosong. Dengan pengenepian ini, milikan tanah yang telah dibeli dipindahmilik kepada Punca Alam. Sebaik sahaja tanah tersebut telah dipindahmilik kepada Punca Alam, responden-responden tidak lagi boleh menuntut milikan tanah tersebut.

[2b] Ianya boleh dihujahkan dengan tegasnya bahawa tanah perayu tersebut adalah terlingkung di dalam tanah yang telah dijual kepada Punca Alam. Dengan itu, persoalan samada responden mempunyai *locus standi* untuk memfailkan permohonan A. 89 terhadap perayu dalam keadaaan-keadaan kes semasa adalah isu yang boleh dibicarakan.

[3] Terdapat kes yang sesungguhnya boleh dihujahkan bahawa peneroka-peneroka tersebut telah menghuni tanah tersebut dengan kebenaran tersirat pihak berkuasa negeri. Sungguhpun kemasukan oleh mereka terhadap tanah tersebut adalah salah disisi undang-undang, terdapat kes yang boleh dihujahkan bahawa mereka telah menghuni tanah tersebut dengan persetujuan pihak berkuasa negeri. Ini juga adalah isu yang boleh dibicarakan.

[Rayuan dibenarkan.]

Cases referred to:
Bohari Taib & Ors v. Pengarah Tanah Galian Selangor [1991] 1 CLJ 647 ***(aff)***
Chiu Wing Wa & Ors v. Ong Beng Cheng [1994] 1 CLJ 313 ***(refd)***
Salim Ismail v. Lebbey Sdn Bhd [1997] 1 CLJ ***(refd)***
Suharta Development Sdn Bhd v. Ho Lik Sdn Bhd [1994] 1 CLJ 407 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 89 r. 1
National Land Code 1965, s. 425(1)
Selangor State Development Corporation Enactment 1964, s. 4(1)(a)

For the appellant - Sulaiman Hj Abdullah (R Sivarasa & Loo Yoon Choy with him); M/s WK Yap, Loo & Co
For the respondent - K Kirubakaran (Max Yong Boon Swee with him); M/s Kiru & Yong

[Appeal from Court of Appeal, Kuala Lumpur; Appeal No: B02-422-95]

Reported by S Dharmendran

JUDGMENT

Zakaria Yatim FCJ:

This court had earlier allowed this appeal with costs. The decision was unanimous.

We shall now set out our grounds for allowing the appeal.

The respondent, Perbadanan Kemajuan Negeri Selangor (PKNS) filed an application by originating summons under O. 89 r. 1 in the High Court Shah Alam to evict the defendants from a piece of land known as Lot PKNS/PA 124 in Kawasan 1, 2, 3, 4, 5, 6, 7, 8, & 9 in Mukim Sungai Buluh, in the district of Petaling. The defendants were unknown persons who resided on the said land. Subsequently, the appellant, Shaheen binti Abu Bakar (Shaheen) applied to be included as a defendant. Her application was allowed and she was made the second defendant. She also resided on the said land.

At the commencement of the hearing in the High Court, the case against the unknown defendants was settled and the learned judge recorded the terms of the settlement. Shaheen was not included in the settlement, and the learned judge proceeded to hear the application against Shaheen. The learned judge allowed PKNS' application against Shaheen with costs.

Shaheen appealed to the Court of Appeal. There were two other appeals against the decision of the learned judge. The respondent in the two other appeals was Punca Alam Sdn. Bhd. (Punca Alam). The three appeals were heard together. The Court of Appeal dismissed the three appeals with costs. See [1996] 2 CLJ 965; [1996] 1 MLJ 825. Shaheen filed an application in this court for leave to appeal against the decision of the Court of Appeal. Leave was granted and the present appeal is between Shaheen and PKNS.

PKNS' application was supported by two affidavits affirmed by its land officer, Kanisah bte Saabin, on its behalf on 10 November 1994 and 22 May 1995 respectively (Kanisah's affidavits). Shaheen's affidavits opposing the application were affirmed on 26 April 1995 and 4 May 1995 respectively.

In her affidavits, Kanisah averred that PKNS was the owner of a piece of land known as Kawasan 1, 2, 3, 4, 5, 6, 7, 8 & 9 in Mukim Sungai Buluh, Daerah Petaling (the said land). The said land was given to PKNS by the Government of the State of Selangor. On 18 July 1994 PKNS entered into a sale and purchase agreement with Punca Alam. Under the agreement PKNS sold 248 acres of the said land to Punca Alam. A copy of the sale and purchase agreement was exhibited to the affidavit affirmed on November 1994 as exh. "KS-1". According to Kanisah, Punca Alam was entitled to have the

land delivered to it in vacant possession under cl. 7 of the agreement for the purpose of a housing project and to build a golf course. She alleged that when PKNS appointed surveyors to survey the land, the surveyors found illegal housing structures on the said land. She claimed that these housing structures were outside the area of land sold to Punca Alam. She contended that the land, including Shaheen's land was on Lot PKNS/PA 124 which was owned by PKNS. In support of her contention she referred to a copy of the suveryors plan of the area exhibited as exh. "KS-2". Kanisah said the housing structures were built on the said land without the consent or approval of the land office and Majlis Daerah Petaling Jaya.

In her affidavit, Shaheen averred that in 1982 the Penghulu of Mukim Sg. Buluh encouraged her father, Hj. Abu Bakar and others to open up new land for cultivation *(meneroka)* on the said land. They cleared the jungle, fixed boundaries and dug canals. In 1983, Hj. Abu Bakar built a permanent housing structure on his land. He and the other settlers on the said land constructed fish ponds. The fish ponds were registered by the Fisheries Department of the Federal Territory. The Department also gave them different types of fresh water fish for breeding in the ponds. In 1985 Hj. Abu Bakar gave the land to Shaheen as a gift. Shaheen further averred in her affidavit, that the state authority built a *surau* for the settlers on the said land. The area came to be known as Kampung Sungai Rumput. She said that she and the other settlers had occupied the said land with the consent and or acquiescence of the owner of the land namely the State of Selangor. PKNS knew about the settlers on the said land after the State Government had approved its application but until 10 November 1994 it did not object to the occupation of the land by the settlers. Shaheen averred that House no. 124 was located on the land sold to Punca Alam. She therefore contended that PKNS had no *locus standi* to make the application under O. 89 of the Rules of the High Court because PKNS was not the registered owner of the said land.

We shall first deal with the law. Order 89 r. 1 of the Rules of the High Court 1980 states:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

Order 89 has been considered by the then Supreme Court in *Bohari bin Taib & Ors. v. Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343. In that case the forefathers of the appellants and other unnamed occupiers were pioneer settlers of the agricultural land in dispute. The appellants alleged that between

1971 and 1976 they and the others made application to the state authority for titles of the said land. There was evidence by affidavit and documentary exhibits to show that the Selangor State Executive Council had approved the alienation of the said land to the appellants and other settlers. Temporary occupation licences (TOL) were granted to the farmers on the understanding that separate titles to the land would be issued. The TOL period expired in 1984. The appellants and the other settlers expected to be issued with land titles. The respondent however thought fit to hand over the lands to the Federal Land Consolidation and Rehabilitation Authority (FELCRA). The respondent applied summarily under O. 89 of the Rules of the High Court for possession of the land. The issue before the High Court was the propriety of the application of the said O. 89 to the facts and circumstances of the case. The learned judge allowed the application of the respondent. The appellants appealed. The Supreme Court allowed the appeal. Mohamed Azmi SCJ in delivering the judgment of the court said, *inter alia*:

> In our view, the appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, if not all, of the other farmers have occupied the land for three years under licence and thereafter have remained in occupation with the continued consent of the state government by virtue of the 1980 alienation already approved prior to the TOLs. The learned State Legal Adviser, Encik Hishamuddin for the respondent, pointed out that the TOLs and therefore consent were given only up to 1983. After that no TOL was issued, thus indicating absence of consent. In our view, the alleged continued consent of the state government to their occupation notwithstanding the expiry of the TOLs, is one of the serious issues to be tried. The case for the appellants is that they were already in occupation with consent prior to 1981 and the grant of TOLs from 1981 to 1983 is merely part of the chain of events supporting the existence of an approval of alienation of the lands to them by the state authority under s. 42 of the National Land Code 1965, and pending issue of titles under s. 77(2) they are entitled to remain on the land not as squatters but as of right. The approval of the state authority as exhibited by the appellants, would appear to have been made on 4 September 1980, according to the letter of the Collector of Sabak Bernam dated 25 October. The opening paragraph of the letter at p. 95 of the appeal record reads:
>
> > Merujuk kepada perkara tersebut di atas, dimaklumkan bahawa permohonan tuan/puan ke atas tanah di Rancangan tersebut di atas telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri pada 4 September 1980.
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> We are therefore of the opinion that there are issues to be tried in this case which are not suitable to be decided by affidavit evidence. We accordingly agree that this case should not be dealt with summarily under O. 89.

Mohamed Azmi SCJ went on to state:

> In our opinion, for the purpose of the summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence *viva voce* is required not only on the alleged consent of the respondent to the appellants' occupation rendering their entry lawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s. 42 of the National Land Code 1965.

From the judgment in *Bohari* case, it is clear that a court hearing an application under O. 89 considers only affidavit evidence. The persons against whom the proceeding is filed need only show they have an arguable case that they occupied the land under licence.

In *Chiu Wing Wa & Ors. v. Ong Beng Cheng* [1994] 1 MLJ 89 @ 94, Mohamed Azmi SCJ said that the summary procedure under O. 89 is governed by the same principles as those under O. 14 of the Rules of the High Court, 1980. To entitle a defendant to a trial, all he needs to do is to show that there is a triable issue of law or fact. According to *Bohari*, where there are issues to be tried the case should not be dealt with summarily under O. 89.

In our opinion the principles laid down in *Bohari* case apply to the present case.

We shall now deal with the question of *locus standi.*

In the High Court and in the Court of Appeal, Shaheen's counsel argued that PKNS had no *locus standi* because it was not the registered owner of the said land. The case of *Suharta Development Sdn. Bhd. v. Ho Lik Sdn. Bhd.* [1993] 2 AMR 40 was cited in support of this argument. Both the High Court and the Court of Appeal rejected this argument and held that PKNS had *locus standi* to make the application under O. 89.

When this appeal was argued before this court, Haji Sulaiman Abdullah, counsel for Shaheen, abandoned that argument. He proceeded to argue that PKNS had no *locus standi* because it was not clear from the evidence whether PKNS was in possession of the said land. Mr. Kirubakaran, counsel for PKNS submitted that PKNS was in possession of the said land.

In our opinion a person who claims possession has the *locus standi* to bring a proceeding under O. 89. The question is who has the *locus standi*?

In its letters to PKNS, the State Government of Selangor had approved PKNS' application to own 4,156 acres of state land in Mukim Sungai Buluh Daerah Petaling. In his letter of approval dated 7 July 1992, the District Land Administrator of Petaling stated in paras. 1.4 & 1.5 that PKNS was entitled to transfer the land to the first buyer and the first buyer was allowed to mortgage the said land to any bank or financial institution. By these letters PKNS had obtained ownership and possession of the said land. But before PKNS brought the proceeding against Shaheen and the other settlers on the said land, it entered into a sale and purchase agreement with Punca Alam on 18 July 1994.

In considering the question of *locus standi* it is relevant to note the reasoning of the Court of Appeal on this issue. In its judgment, the Court of Appeal said, at pp. 153 and 154 of the Appeal Record:

> In order to carry out its object, PKNS entered into a joint venture with a private developer. A joint venture company called Punca Alam Sdn. Bhd. ('Punca Alam') was incorporated in which both PKNS and the developer had shares. PKNS then entered into a sale and purchase agreement with Punca Alam under the terms of which it sold the land in question to the latter. Punca Alam paid a deposit to account of the purchase price while awaiting the registration of the alienated title in favour of PKNS.
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> Now, there was a problem with the land. Although it belonged to the State at all material times, it was not vacant. Vacant possession of the land was essential to enable PKNS and Punca Alam to carry out the proposed housing and industrial development. They were unaware of the identities of the 154 occupants who were on the land. They therefore prayed in aid the summary procedure prescribed by O. 89 of the Rules of the High Court, 1980 to obtain possession.
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> Three separate summonses were taken out. PKNS was the plaintiff in the first, while Punca Alam was plaintiff in the other two. Orders for vacant possession were obtained on the summonses against all those in possession of the land. Of the 154 occupants, 151 vacated the land in obedience to the orders. Only the appellants in these three appeals remained in occupation. Two of them applied to the court and had the *ex parte* orders for possession set aside. The order against the third was also set aside although he was originally represented by counsel when the summons for possession was heard. All three summonses were then re-heard before James Foong J who, after hearing arguments, made orders of possession against each of the appellants. It is against those orders that the present appeals have been brought.

Although there are some facts peculiar to each appeal, they all concern the same piece of land, have many other common facts and raise identical issues of law. The appellants are all represented by the same counsel. The respondents too have common representation. Hence, when these three appeals came up for hearing on January 23, 1996, they were, with the consent of counsel, heard together. For the reasons given, this seemed the most convenient course to take.

At p. 161 of the Appeal Record, the Court of Appeal went on to state:

What is important is whether the evidence shows the respondents to have the right to possession. I think that it does. This is an example of a case where more than one person has the right of possession vested in him. In my judgment, the learned judge was entirely right in holding that, on the facts before him, the respondents had the necessary standing.

What I have said thus far would also answer the other point raised by counsel, namely, that the plan annexed to PKNS' affidavit shows the portion occupied by the first appellant (Shaheen bt. Abu Bakar) to be within the area sold to Punca Alam. This approach overlooks the practical realities of the case.

Punca Alam is, as earlier pointed out, the joint venture vehicle by which PKNS intends to bring development to the area in question. In a case like this, it is of no practical consequence which portion of the land she occupies. The vital question is whether the occupation is lawful or unlawful.

In our opinion the Court of Appeal has erred in fact and in law in its judgment. There is no evidence that Punca Alam was a joint venture company established by PKNS and a private developer. There is also no evidence that PKNS was a shareholder of Punca Alam. The relationship between PKNS and Punca Alam was that of vendor and purchaser. The heading of the sale and purchase agreement states:

AN AGREEMENT made the 18th day of JULY, 1994 BETWEEN PERBADANAN KEMAJUAN NEGERI SELANGOR a statutory body incorporated under the Selangor State Development Corporation Enactment 1964 and having its head office at Persiaran Barat, Off Jalan Barat, 46505 Petaling Jaya, Selangor Darul Ehsan (hereinafter referred to as "PKNS") of the one part **and PUNCA ALAM SDN. BHD. a Company incorporated in Malaysia and having its registered office at Level 19, Shahzan Prudential Tower, Jalan Sultan Ismail, 50250 Kuala Lumpur** (hereinafter referred to as **"the Purchaser")** of the other part.

[Emphasis added]

The company with whom PKNS had concluded a joint venture agreement was Irama Sejati Sdn. Bhd. (Irama Sejati) and not Punca Alam. Paragraph (3) of the preamble in the sale and purchase agreement states:

a WHEREAS:- ...

(3) **Pursuant to a Joint Venture Agreement dated 18th May 1984** (hereinafter referred to as **'the Joint Venture Agreement'**) **between PKNS and one IRAMA SEJATI SDN. BHD. a company incorporated in Malaysia and having its registered office at Suite 13A & 13B, 13 Floor, Office Tower,**
b **Nagaria Complex, 12, Jalan Imbi, 55100 Kuala Lumpur** ... PKNS has agreed to sell and the purchaser has agreed to purchase the said land ... (Emphasis added)

Irama Sejati was not involved in any application to evict the settlers. PKNS filed one application under O. 89 and Punca Alam filed two applications under
c O. 89. The High Court, after hearing the three applications made orders evicting the 154 settlers from the said land including Shaheen. The Court of Appeal confirmed the orders.

It is now necessary to examine cl. 7 of the sale and purchase agreement. The
d clause states:

Upon the execution of this Agreement and payment of the First Ten per cent (10%) deposit as stated in the Third Schedule hereto, PKNS shall allow the Purchaser to take **vacant possession of the said land**. (Emphasis added]

e According to s. (1) of the third Schedule to the sale and purchase agreement, the 10% deposit was paid upon execution of the Agreement. Indeed, cl. 2 states that the 10% deposit had been paid to PKNS and PKNS acknowledged receiving the money. Clause 2 states:

f In consideration of the sum stated in Section 1 of the Third Schedule hereto paid by the Purchaser to PKNS as payment to account of the Purchase Price of the said Land on the execution of this Agreement (the receipt whereof PKNS hereby acknowledges), PKNS hereby agrees to sell and convey unto the Purchaser all the rights title and interest of PKNS in the said Land at the Purchase Price and subject to the terms conditions and stipulations hereinafter contained.

g Mr. Kirubakaran, counsel for PKNS confirmed that Punca Alam paid the 10% deposit when the sale and purchase agreement was signed on 18 July 1994. He said that under the agreement Punca Alam was entitled to **vacant possession.**

h Under cl. 2 of the agreement, PKNS agreed to sell and convey to Punca Alam all rights title and interest of PKNS in the said land subject to the conditions contained in the Agreement. One of the conditions is that PKNS was to deliver **vacant possession** of the said land upon receiving the 10% deposit.

i Under the agreement PKNS sold 248 acres of the land to Punca Alam. The remaining 3,906 acres still belonged to PKNS.

The question that arises here is whether Shaheen's land is located within the 248 acres or in the area within the 3,906 acres. In para. 7 of her affidavit affirmed on 10 November 1994, Kanisah said that Lot PKNS/PA 124 was within the area owned by PKNS as shown in the surveyors plan in exh. "KS-2". Shaheen, however said that her house was located on the land sold to Punca Alam. Hj. Sulaiman, counsel for Shaheen told this court that Shaheen's land was within the 248 acres sold to Punca Alam. It appears from the judgment of the Court of Appeal quoted earlier, that Shaheen's counsel had raised the point that the plan, annexed to PKNS' affidavit showed the portion occupied by Shaheeen was within the area sold to Punca Alam. Curiously enough the Court of Appeal did not decide on the point raised but went on to state that "it is of no practical consequences which portion of the land she occupies." The Court of Appeal confirmed the finding of the High Court that PKNS had the *locus standi* to bring the action against Shaheen and the others.

In our view it is imperative that the location of Shaheen's land be determined in order to decide on the question of *locus standi.*

We have examined exh. "KS-2", the surveyors plan exhibited to the first affidavit of Kanisah and we are satisfied that Lot PKNS/PA 124 is located in the shaded area of the plan. It can be strongly argued that the lot is located within the 248 acres of the land sold to Punca Alam. The remaining 3,906 acres of land which belonged to PKNS is located at the top of the plan marked "TANAH PKNS".

PKNS filed the O. 89 application against Shaheen and the others on 23 November 1994, that is four months after the signing of the sale and purchase agreement.

As stated earlier the Court of Appeal said that Punca Alam also filed two applications under O. 89. It could only file the applications in respect of the 248 acres of land.

It appears that Punca Alam, by its conduct in filing the two applications, had waived its right under cl. 7 of the Agreement to have the land delivered to it in vacant possession. Such waiver entitled it to claim possession of the said land. With the waiver, possession of the land including Shaheen's land was transferred to Punca Alam. Once the said land was transferred to Punca Alam, PKNS could no longer claim possession of the said land. In our view, this is a triable issue. The Court of Appeal said that the learned judge was entirely right in holding that PKNS and Punca Alam had the necessary standing. In our view, the question of whether PKNS had the *locus standi* to file the O. 89 application against Shaheen in the circumstances of the present case is a triable issue. On this ground alone the appeal ought to be allowed.

We shall now turn to the second ground.

The evidence as disposed in the affidavits shows that in 1982 the Penghulu of Mukim Sungai Buluh encouraged Shaheen's father and the other settlers to open up new land in the said area. They cleared the jungle, fixed boundaries and dug canals. PKNS, in its affidavits did not deny this fact. It merely stated that Shaheen did not produce evidence on the appointment of the Penghulu and whether he had authority to permit Shaheen's father and the others to occupy the land. The evidence on the appointment and the authority of the Penghulu can only be produced at the trial. The question of whether the settlers entered the said land with the consent of the relevant State authority is therefore a triable issue.

Shaheen's father built a permanent house on the land. In 1984 – 1985 her father and the other settlers built fish ponds. The Fisheries Department of the Federal Territory registered the fish ponds and supplied various types of fish fry. On 14 December 1987, the Petaling District office issued a local order with instruction to the contractor to repair and renovate the *Surau* on the said land known as Kampung Sungai Rumput. The cost of the work as stated in the local order was RM9,963.60. The Menteri Besar was aware of the development about the *Surau.* In a letter dated 19 January 1988, the Political Secretary to the Menteri Besar wrote to the Director of Forestry stating that the Menteri Besar had given his approval about the *Surau*. The Menteri Besar was also aware that the village was provided with water supply, roads and a community hall. This was stated by the Divisional Head of UMNO, Petaling Jaya Division, in his letter dated 15 January 1988 to the Menteri Besar.

From the evidence, the Menteri Besar knew of the development in Kampung Sungai Rumput. He took no action to remove the settlers from the land. Indeed the State Government took no action at all against the settlers. Even when PKNS' application for the land was approved and PKNS was entitled to claim possession of the said land, it took no action against the settlers. PKNS knew of the development on the said land because under s. 4(1)(a) of the Selangor State Development Corporation Enactment 1964, the Menteri Besar is its Chairman. In our view Shaheen's father and the other settlers lived on the said land with the implicit consent of the State Government. It was only after the sale and purchase agreement was concluded on 18 July 1994 that the question of removing the settlers from the kampung arose because under s. 7 of the Agreement PKNS was to deliver vacant possession to Punca Alam upon execution of the agreement and payment of the 10% deposit.

From the affidavit evidence, we find that this is not a case to be dealt with summarily under O. 89. There are triable issues which should be determined at the trial.

We now deal with the last ground for allowing the appeal.

The Court of Appeal cited a passage from *Bohari* case and said at p. 164 of the Appeal Record:

> It may be seen from the passage quoted above that there are two elements ... that oust the operation of O. 89. They are as follows:
>
> (1) The initial entry upon the land must be lawful; and
>
> (2) The existence of any express or implied consent or licence on the part of the owner pursuant to which the occupation continued.
>
> In respect of the second element, all that need be shown to exclude O. 89 is that the issue of consent or licence is triable ...

We agree that the second element is the fundamental principle laid down in *Bohari* case. We find, however, that the first element is nowhere mentioned in the passage quoted by the Court of Appeal. What the Supreme Court said in *Bohari* case was that there was a distinction between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent.

Haji Sulaiman submitted that assuming the initial entry of the settlers on the said land was unlawful, acquiescence made such entry lawful. He cited *Salim bin Ismail v. Lebbey Sdn Bhd* [1997] 2 MLJ to support his submission.

In that case, the Court of Appeal said that if the appellants settled on the state land without permission, they committed an offence under s. 425(1) of the National Land Code for illegally occupying state land. They could be fined up to RM10,000, each or sentenced to prison up to a year. However government departments and agencies had provided public amenities to them. With the availability of such evidence, an issue was raised as to whether the conduct of the government agencies could be interpreted as consent of the state authority. The court held this was a triable issue.

Similarly in the present case, if the initial entry of the settlers on the said land was unlawful, they had committed an offence under s. 425(1) of the National Land Code. They could also be evicted under O. 89 for being squatters simpliciter. From the evidence the state government knew of their presence on the said land from December 1981. No action was taken to charge them under the National Land Code for illegally occupying the said land. No proceeding was taken to evict them under O. 89. From January 1988 the Menteri Besar knew about the settlers. He approved the renovation of their *surau*. He knew that the settlers were provided with water supply, roads and a community hall. As stated earlier, when the land was given to PKNS, it knew about the settlers. In our opinion there is an arguable case that the settlers occupied the said land with the acquiescence of the state authority.

To conclude our judgment, we find that the settlers in Kampung Sungai Rumput were not squatters simpliciter. There is a strong arguable case that they occupied the said land with the implicit consent of the state authority. Even if their entry on the said land was unlawful, there is an arguable case that they occupied the said land with the acquiescence of the state authority. It was for these reasons that we decided to allow the appeal.